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NTSB Order No. EA-4959

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of March, 2002

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. JACK L. WHICKER and RUSSELL S. WOOD, Respondents.	)	Dockets SE-15613 and SE-15614

OPINION AND ORDER

Respondents appeal the written initial decision of Administrative Law Judge William A. Pope, II, issued on September 20, 1999, after an evidentiary hearing conducted August 24-26, 1999, in Atlanta, Georgia.[1] By that decision, the law judge affirmed the Administrator's order of suspension

[1] The law judge's initial decision is attached.

against both respondents for violations of Federal Aviation Regulation ("FAR") sections 91.13(a) and 121.315(c).[2] The Administrator sought 30-day suspensions of respondents' airmen certificates, including their airline transport pilot ("ATP") certificates, but the law judge modified respondent Whicker's sanction to a 15-day suspension and waived sanction against respondent Wood pursuant to the Aviation Safety Reporting System ("ASRS").[3] We deny respondents' appeals.

The Administrator's case arose from a runway excursion incident at the Hartsfield-Atlanta International Airport on April 13, 1998, after an FAA post-incident investigation

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[2] FAR sections 91.13(a), 14 C.F.R. Part 91, and 121.315(c), 14 C.F.R. Part 121, provide, in relevant part, as follows:

> **Sec. 91.13 Careless or reckless operation.**
>
> (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.
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> * * * * *
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> **§ 121.315 Cockpit check procedure.**
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> (c) The approved procedures must be readily usable in the cockpit of each aircraft and the flight crew shall follow them when operating the aircraft.

[3] The Administrator does not appeal the modification of respondent Whicker's sanction or the waiver of respondent Wood's sanction, and, therefore, we have no occasion to review those issues.

revealed alleged deficiencies in the crew's conduct of the approach and landing. Respondent Whicker was pilot-in-command (captain) and respondent Wood was second-in-command (first officer) of Delta Air Lines Flight 358, a McDonnell-Douglas MD-88 aircraft, operating from Huntsville, Alabama to Atlanta, Georgia. Respondent Whicker was the pilot flying, and respondent Wood was performing pilot-not-flying ("PNF") duties. As respondents conducted their approach to Runway 8L at Atlanta, the weather conditions were clear, but turbulent with gusty, near-direct crosswinds that, during the approach, ranged from 11 to 16 knots. Before conducting the approach, respondents calculated a final approach target speed of 141 knots indicated airspeed ("KIAS"). Respondents testified that they calculated a final approach speed of 130 KIAS for their gross weight of approximately 124,000 pounds, and added 11 knots because of the ATIS-reported winds of 14 knots, gusting to 18 knots (one-half of the steady-state winds, plus all of the gust factor).

The relevant excerpts from the Delta Flight Operations Manual and the Delta MD-88/90 Operating Manual are a part of the record. The Delta Flight Operations Manual states that for approaches in visual meteorological conditions ("VMC"), "[b]y 500 feet [above field elevation], the aircraft must be ... on target airspeed within tolerances." Exhibit ("Ex.") A-10. The final approach airspeed tolerances are -5/+10 KIAS. Id. The

Delta Flight Operations Manual also cautions, in boldface print, that "[t]hese conditions must be maintained throughout the rest of the approach for it to be considered a stabilized approach" and states that a go-around should be initiated if those "criteria cannot be established and maintained[.]" Id. The Flight Operations Manual also contains the following, in boldface print: "WARNING. Do not attempt to land from an unstable approach." Id. The Delta MD-88/90 Operating Manual also contains a similar warning: "If airspeed, descent rate, and runway line up are not established by 500 feet AFE, initiate a go-around." Id. With regard to the spoilers, the before-landing checklist requires that they be armed. Ex. A-7. The Delta MD-88/90 Operating Manual states that it is the duty of the PNF to "confirm[] spoiler deployment" and "deploy spoilers manually if necessary." Ex. A-7.

According to respondents' expert, information derived from Flight 358's flight data recorder revealed that during the incident approach the aircraft was properly established on the instrument landing system -- both the localizer and the glideslope -- and, although the airspeed fluctuated, during the last 500 vertical feet of the incident approach airspeed averaged 157 KIAS.[4] Respondents both testified that respondent

[4] It appears from this record, including the testimony of respondents' aircraft performance expert, that there is not

Whicker applied power rapidly just before touchdown to arrest a sudden, high sink rate, and this power input was corroborated by the data on the flight data recorder. Airspeed momentarily peaked at 170 KIAS just before main gear contact with the runway. After touchdown, unbeknownst to respondents at the time, the spoilers did not automatically deploy, and, as a consequence, the selected autobraking did not activate. Manual braking was initiated, according to respondent Whicker, at the normal point in the landing, but, also unbeknownst to respondents at the time, braking effectiveness was reduced because of a previously-undiscovered failed anti-skid transducer on one of the main gear wheel brake assemblies.[5] Respondents

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dispute as to whether the flight data recorder recorded *indicated* airspeed essentially as it would have been displayed in the cockpit.

[5] The failed transducer caused the aircraft's anti-skid system to cancel brake application to the affected wheel. At the hearing, the Administrator stipulated that the aircraft "would have stopped on the runway if all -- if full braking had been available to the aircraft at that time." Tr. at 581. It is not clear whether the Administrator meant to say that the aircraft would not have departed the runway except for the failed transducer, or that the aircraft would not have departed the runway if the transducer had not failed, the spoilers were deployed and the autobraking system was activated. For our purposes here, however, we will assume the Administrator meant to stipulate that the aircraft would not have departed the runway had the transducer not failed. Although a fair reading of this record establishes that the Administrator first brought her case on the theory that respondents' performance directly caused the aircraft to depart the runway, at the hearing her theory of the case became simply that respondents failed to adequately follow the approved cockpit procedures. To be sure,

testified that they armed the spoilers during the approach, and respondent Wood testified that, after landing, he "confirmed" spoiler deployment by reference to the sound of the servo motor he associated with the spoiler actuator handle.[6] According to respondents, and a pilot seated in the cockpit jumpseat, the approach and landing seemed normal until the aircraft was about 2,000 feet from the end of the runway during its rollout and it became obvious it was not decelerating as expected. As the aircraft neared the end of the runway, respondent Whicker steered the aircraft to the left towards an open ramp area but the aircraft came to a stop with the nose gear and right main landing gear wheels off of the paved runway surface. Subsequent examination revealed that there was no damage to the aircraft as a result of the excursion.

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although we have no doubt that the excursion is the event that caused this approach to come under the Administrator's scrutiny, this fact is not now material to our review of the Administrator's charge that respondents failed to follow FAA-approved cockpit procedures and guidance. See Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987) (prosecutorial discretion is to be exercised by the enforcement agency and the Board's role is to review the evidence in a particular case to determine if it supports the allegations). Respondents do not, and cannot, contend that they did not have adequate notice of the basis for their violations -- failure to follow FAA-approved cockpit procedures.

[6] This sound, the record makes clear, is not uniquely associated with spoiler deployment, and, therefore, it is not a reliable indication of spoiler deployment.

The law judge found that respondent Whicker violated FAR sections 91.13(a) and 121.315(c) by not initiating a go-around when final approach airspeed tolerances could not be maintained. The law judge reasoned that even if, as respondent Whicker argued,

> a higher airspeed than the target airspeed with allowable tolerances may have been necessary to maintain control of the aircraft during the final 500 feet of the descent because of wind gusts and turbulence, this does not establish that it was necessary for [Captain] Whicker to deviate from the requirement that a stabilized approach be established and maintained during that portion of the descent. The record contains insufficient evidence to establish any imperative to continue the descent and landing when the airspeed component of the stabilized approach could not be established and maintained, as required by the Flight Operations Manual and [MD-88/90 Operating] Manual.

Initial Decision ("I.D.") at 8-9. The law judge found that respondent Wood violated FAR sections 91.13(a) and 121.315(c) by not confirming spoiler deployment upon landing (and manually deploying them when they failed to deploy automatically) because his "reliance on the sound of the servo motor actuating to confirm deployment of the spoilers ... was ineffective, unreliable and unreasonable." I.D. at 11-12.

Respondents each filed ASRS reports, but the law judge found that only respondent Wood met the criteria for waiver of

sanction under the ASRS program. According to the law judge, respondent Wood's "violation of cockpit procedures, by failing to properly confirm deployment of the spoilers, was inadvertent" and respondent Wood "believed ... that the method of confirmation he relied upon, the sound of the servo motor actuating, was reliable." I.D. at 12. As to respondent Whicker, however, the law judge found the ASRS waiver provisions inapplicable because of his "conscious and deliberate decision" not to "go-around when he was unable to establish and maintain a stabilized approach." Id.

On appeal, respondents contest the law judge's findings that they each violated FAR sections 91.13(a) and 121.315(c), and respondent Whicker also argues, in the alternative, that he is entitled to ASRS immunity from sanction.[7] The gravamen of respondent Whicker's argument is that, contrary to the law judge's assessment, he did not *elect* to fly an unstable approach but, rather, he flew a "stabilized" approach "utilizing the good sense and judgment ... gained from long experience, and exercising the discretion Delta guidelines afforded him."

[7] Respondent Wood also argues, inferentially, that notwithstanding the ASRS waiver a 30-day suspension was not an appropriate sanction. The Board does not undertake analysis of sanction where ASRS immunity is granted. Administrator v. Friday, 6 NTSB 949, 951 (1989) ("our law judges should not undertake to determine what period of suspension would be appropriate for violations found proved where the Administrator has waived service of any suspension").

Respondents' Brief at 17. In support of this argument, respondent Whicker argues that he was aware that Delta guidance allowed him to add as much as 20 knots to the calculated final approach base speed of 130 KIAS (which, allowing for tolerances, would permit a final approach airspeed as high as 160 KIAS), that the calculated final approach target speed of 141 KIAS only took into account the ATIS-reported winds, that upon reaching the terminal area and experiencing the turbulent conditions and "wing rock" the crew attributed to wingtip vortices from other aircraft it was prudent to carry extra energy on the approach, and, in fact, he verbalized his intention not to significantly reduce engine power upon reaching the final approach fix and consciously avoided "chasing" the fluctuating airspeed. Respondent Wood argues that none of the applicable Delta guidance required, at the time, that he confirm spoiler deployment by *visual* reference to spoiler actuator handle deployment, and, therefore, that he did, in fact, comply with the applicable cockpit procedures in every respect.

Turning first to respondent Whicker's argument, we do not disagree that responsibility inheres to the commander of an aircraft to exercise his best judgment in meeting the conditions that present themselves during flight operations, and we have no doubt that in executing the approach on April 13, 1998, it was far more prudent, within limits, to carry extra airspeed and

engine power than it would have been to perform the approach in an opposite manner. However, even assuming, arguendo, that FAA-approved Delta procedures authorized a final approach airspeed as high as 160 KIAS in this instance (a claim we do not think to be adequately supported by this record), we note that even this airspeed limit was exceeded. As the aircraft descended below 500 feet above field elevation (the point where final approach target airspeed must be stabilized, according to the FAA-approved Delta procedures), the aircraft flight data recorder recorded an airspeed of 156 KIAS, but approximately seven seconds later, at a radar altimeter-recorded altitude of approximately 350 feet above field elevation, airspeed exceeded 160 KIAS and remained above 160 KIAS for several seconds. Thereafter, airspeed dropped to a low of 150.5 KIAS over the next several seconds before again exceeding 160 KIAS at a radar altimeter-recorded altitude of approximately 130 feet above field elevation and, in fact, remained above 160 KIAS until after the aircraft touched down. Under these circumstances, in light of the applicable FAA-approved Delta procedures and guidelines, we are constrained to uphold the Administrator’s contention that respondent Whicker should have executed a go-around when the aircraft’s final approach target airspeed was

not being maintained within tolerances, in contravention of FAR sections 91.13(a) and 121.315(c).[8]

Turning to respondent Wood, the only issue as to his alleged violation of FAR sections 91.13(a) and 121.315(c) is whether he complied with the FAA-approved cockpit procedures that require that he confirm spoiler deployment upon landing. See I.D. at 10. We find the evidence supports the law judge's finding that the applicable guidelines and procedures required that respondent Wood *visually* confirm spoiler actuator handle deployment,[9] and, because respondent Wood testified that he relied merely on the *sound* of the servo motor to erroneously confirm spoiler actuator handle deployment, the evidence

[8] An "operational" violation of section 121.315(c) is sufficient to support a "residual" or "derivative" violation of section 91.13(a). Administrator v. Nelson, NTSB Order No. EA-4533 (1997) at 5.

[9] Respondent Wood's argument that the mandatory bulletin cited by the law judge only applies to "slippery, contaminated runway, crosswind conditions," is misplaced, for its significance here is that it placed respondent on notice before the incident that *visual* confirmation of spoiler handle movement is necessary to ensure spoiler deployment. Although, to be sure, spoiler deployment becomes even more critical where "slippery, contaminated, cross-wind conditions" exist, it is also clear that the *visual* component of this procedure is not unique to the flight conditions in which the aircraft is operating, but, rather, it is related to the necessity to adequately confirm that, indeed, the spoilers have been deployed. We have no hesitation in expecting respondent Wood, an ATP-rated air carrier pilot who is held to the highest airmen standards, to appreciate this fact. Ex. A-14 ("THE PNF MUST VISUALLY CONFIRM AND ANNOUNCE 'SPOILERS UP'. IF THE SPOILERS DO NOT EXTEND, THE

supports the finding that he therefore violated FAR sections 91.13(a) and 121.315(c).[10]

Finally, we turn to respondent Whicker's eligibility for waiver of sanction under the ASRS program. The law judge found that respondent Whicker's approach and landing on April 13, 1998, constituted a "deliberate" decision to violate FAR section 121.315(c) because he did not initiate a go-around when target speeds were not being maintained within tolerances. We agree. We are satisfied from this record that respondent Whicker was aware of both his actual airspeed and the FAA-approved Delta airspeed limitations that were exceeded during the approach on April 13, 1998, and we find his claim that he believed he had discretion to deviate from those standards unpersuasive. In the absence of any credible evidence that respondent Whicker misperceived the FAA-approved cockpit procedures, we are persuaded that respondent Whicker made a conscious decision to continue the approach despite the fact that airspeed requirements for a stabilized approach were not being maintained. As such, we think his violation of section 121.315(c) is fairly described as "deliberate" and, as such, we

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PNF MUST IMMEDIATELY EXTEND THE SPOILERS MANUALLY, OTHERWISE THE AUTOBRAKES WILL NOT FUNCTION!").

[10] See footnote 8, supra.

see no basis to disturb the law judge's finding that he is not entitled to ASRS sanction immunity.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied;

2. The law judge's Decision and Order is affirmed;

3. The Administrator's Orders of Suspension, as modified by the law judge's Decision and Order, are affirmed; and

4. The 15-day suspension of respondent Whicker's certificate shall begin 30 days after the service date indicated on this opinion and order.[11]

BLAKEY, Chairman, CARMODY, Vice Chairman, and BLACK, Member of the Board, concurred in the above opinion and order. HAMMERSCHMIDT and GOGLIA, Members, did not concur, and Member GOGLIA submitted the following dissenting statement, in which Member HAMMERSCHMIDT joined.

> The decision is wrong because not enough consideration was given to gusty crosswinds at the time of landing. The Administrator's principal witness, Aviation Safety Inspector David Gaumer, relied only on airspeed and the checklist in concluding that the approach was not stable. Not enough consideration was given to the testimony of Mr. Huhn, an aeronautical engineer. Mr. Huhn testified that the glide slope was stable and that engine power was used properly to maintain glide slope and to arrest descent rates caused by wind gusts, and that the use of engine power did not result in any significant increase in air speed. He also testified that the fluctuations in air speed were the result of gusting, variable winds, and mild to moderate windshear. He further testified that the actual

[11] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).

motion of the aircraft over the ground was stable and that the aircraft was actually slowing, even though the flight data recorder shows the airspeed increasing rapidly at those same points.

The decision is also wrong because it fails to extend to Respondent Whicker the protections of the Aviation Safety Reporting Program (ASRP). Respondent Whicker's 'conscious and deliberate act' of flying the plane with a stable glide slope, proper runway alignment and stable ground speed, does not constitute 'conscious and deliberate' action that is excluded from the protection of the program when the departure of the aircraft from the runway was due to a mechanical problem of which he had no knowledge, and the departure of the aircraft from the runway was not caused by the actions of the Respondent. It is a misapplication of the exclusion from the ASRP to conclude that the decision not to 'go around' was deliberate and not 'inadvertent', and therefore the Respondent is not entitled to a waiver of any sanction under the program.